

SOUTHERN UTAH WILDERNESS ALLIANCE ET AL.

IBLA 92-490

Decided April 8, 1996

Appeals from a decision of the Grand Resource Area Manager, Bureau of Land Management, authorizing commercial filming within wilderness study area UT-060-118.

Set aside and remanded.

1. Federal Land Policy and Management Act of 1976: Wilderness

The IMP are binding on all BLM State offices. No decision in conflict with the IMP may be sustained on appeal in the absence of an express justification in the record for the failure to follow the policy guidelines established by the IMP.

APPEARANCES: Scott Groene, Esq., Moab, Utah, for appellants.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

The Southern Utah Wilderness Alliance and the Utah Chapter Sierra Club have appealed the decision record and finding of no significant impact (FONSI) of the Grand Resource (Utah) Area Manager, Bureau of Land Management (BLM), dated May 6, 1992, authorizing commercial filming on a 12-mile reach of the Colorado River within the Westwater Canyon wilderness study area (WSA) (UT-060-118) under section 302(b) of the Federal Land Policy and Management Act, 43 U.S.C. 1732(b) (1988).

BLM's decision states that no further environmental analysis or public notification would be required for motion pictures, commercials, or still photography satisfying eight criteria. Each proposal to film within the WSA would be evaluated on an individual basis for conformance with these criteria. The criteria are:

(1) cast and crew size will not exceed 30 people; (2) the activity will not create surface disturbance or involve permanent placement of structures; (3) filming is proposed in conjunction with a BLM permit to float through Westwater Canyon; (4) the company will advise other boaters of the filming activity, when appropriate; (5) all filming activity will remain in the river corridor, with no filming on the canyon rims or cliff faces above the Precambrian (black) granites; (6) no camping is required with

the exception of one watchman when equipment is left on location overnight; (7) the company will post a reclamation bond; and (8) the company will provide funds for the monitoring of the filming activity by BLM.

No more than three permits per month would be issued unless special circumstances warranted; under those circumstances, an additional cumulative analysis would be required. Permits would be issued under the rules in 43 CFR Subpart 2920 1/ and subject to the standard stipulations of land use permits. Rental would be paid in accordance with the film permit schedule, Instruction Memorandum (IM) UT-90-418.

BLM's decision was based on Environmental Assessment (EA) UT-068-92-021, which the Area Manager characterized as a programmatic EA. BLM found that the level of activity described in the EA would not impair the suitability of the lands in the WSA for preservation as wilderness. BLM's decision states: "It is recognized that if the Westwater WSA becomes wilderness, new management prescriptions may have to be implemented. In the interim, BLM is meeting its current mandate of multiple use and sustained yield within existing IMP guidelines." 2/ The Area Manager found no significant impacts on the human environment would be caused by the proposed action, as mitigated, and therefore no environmental impact statement was required.

Appellants contend that the Area Manager's decision violates the Interim Management Policy and Guidelines for Lands Under Wilderness Review (IMP) and the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 (1988).

[1] The guidelines established by the IMP are binding on all BLM State Offices. Ceminex, Ltd., 129 IBLA 64, 71 (1994); Oregon Natural Resources Council, 114 IBLA 163, 167 (1990); The Wilderness Society, 106 IBLA 46, 55 (1988); L.C. Artman, 98 IBLA 164, 168 n.6 (1987).

The IMP provides:

Each State Director will maintain a procedure to notify directly those organizations which express an interest in the types of proposed actions mentioned below before such actions are approved. Proposed actions subject to this notification procedure include, but are not limited to, significant surface-disturbing projects, actions or uses, such as: Request for

1/ BLM is currently considering amendments to these rules. See 55 FR 48810 (Nov. 21, 1990); 60 FR 7878 (Feb. 9, 1995).

2/ "IMP guidelines" refers to the Interim Management Policy and Guidelines for Lands Under Wilderness Review, published in December 1979, 44 FR 72014 (Dec. 12, 1979), and amended in July 1983, 48 FR 31854 (July 12, 1983). The IMP is included in the BLM Manual as a handbook, H-8550-1. References in the text are to the Handbook edition.

approval of mining plans of operations under 43 CFR 3802, applications for permit to drill, notices of intent to conduct oil and gas exploration operations on existing leases, proposed increases in livestock use, BLM-initiated projects, or any other action which has been identified as a concern through the environmental review process. * * *

BLM offices will provide notice at least 30 days prior to starting or authorizing proposed actions, except when it is not possible to do so because of emergency conditions or other regulatory timeframes. * * * The notice should include enough information for the recipient to understand the purpose, location, nature, size, and expected implementation date of the proposed action. The EA must be available for review when this proposed notice of action is sent out.

(IMP at 27-28). 3/

The EA acknowledges the IMP's notification requirement:

Nine film permits were issued by the Grand Resource Area for filming in Westwater Canyon between June 1981 and November 1991. * * * Under current guidelines for management of wilderness study areas, a 30-day period is allowed for public notification of an action proposed in a WSA before the action can take place. Filming requests generally are made a few days prior to the requested filming day, not allowing sufficient time for public notification. Most filming requests for Westwater Canyon are

3/ See also IM No. UT 90-121, Jan. 8, 1990:

Utah BLM is strongly committed to managing WSAs according to the IMP. This involves ensuring * * * (3) interested or affected publics are fully informed; * * *

The BLM in Utah is committed to keeping interested or affected publics fully informed of actions in WSAs. In compliance with the notification procedures in H-8550-1, we will proceed as follows: * * *

"b. When the IMP documentation is complete, notify the State Office PAO [Public Affairs Office] of the decision and the availability of documentation including the EA, FONSI, and proposed decision * * * .

The PAO will provide this information to the public as before, and will also include the notice in the Utah Spectrum. Allow a minimum of 30 days following this notification before the action is put into effect, except when it is not possible to do so because of emergency conditions or other regulatory timeframes."

(IM at 1, 3).

similar, and therefore can be analyzed in a programmatic EA following the Interim Management Policy and Guidelines for WSAs.

(EA at 2).

No variance from the IMP may be authorized absent an express justification in the record for such action. Oregon Natural Resources Council, supra.

Where a variance between the guidelines and the action contemplated exists it is incumbent upon the decision-maker to clearly delineate the area of the conflict and expressly justify any variance from the IMP. Obviously, where, as here, the degree of variance is great, so, too, should be the justification.

The Wilderness Society, supra.

Commercial filming in a WSA is an action which has been identified as a concern through the environmental review process. EA UT-068-92-007 concerning the application of Momentum Films, Inc., for a section 302(b) permit to film a commercial alongside the Bowling Alley Rapids in the Westwater Canyon WSA in November 1991 drew comments from four environmental organizations. In this case, the draft EA generated comments from appellants, two other environmental groups, the Moab (Utah) Film Commission, and the State of Utah Department of Natural Resources.

Filming on public lands in general has been a controversial issue for some years. See 60 FR 7879 (Feb. 8, 1995). Proposals for commercial filming actions are therefore subject to the IMP notification procedures. There are no emergency conditions or regulatory timeframes applicable to these actions. ^{4/} That "[f]ilming requests generally are made a few days prior to the requested filming day" is a matter of planning and timing that is under the control of filmmakers, not an adequate justification for abandoning notice to the public of potentially-impairing actions in WSA's. Whether a particular filming action that meets the criteria set forth in BLM's decision impairs the suitability of the Westwater Canyon for preservation as wilderness depends on the circumstances. To assume no such action could do so begs the question. To exempt any such action from further environmental analysis creates a categorical exclusion from NEPA for commercial filming that is not provided for in the Departmental Manual, 516 DM 6, Appendix 5 at 5.4. See 54 FR 47832-35 (Nov. 17, 1989); State of Wyoming, 91 IBLA 364, 367 (1986). Eliminating notice to the public of proposed actions also vitiates the purpose of the protest provisions set forth at 43 CFR 4.450-2.

We conclude BLM's decision does not conform to the IMP and must be set aside. The Wilderness Society, supra.

^{4/} IM No. UT 90-121, supra note 3, cites as examples of regulatory timeframes 43 CFR Parts 3150 and 3160, Onshore Oil and Gas Order No. 1, and 43 CFR Subpart 3802.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision record of the Grand Resource Area is set aside and remanded.

Will A. Irwin
Administrative Judge

I concur.

James L. Bymes
Chief Administrative Judge

